Supreme Court, U.S.
FILED
FEB 20 1998
CLERK

No. 97-454

In the Supreme Court of the United States

OCTOBER TERM, 1997

UNITED STATES OF AMERICA, PETITIONER

v.

BESTFOODS (FORMERLY CPC INTERNATIONAL INC.), ET AL., RESPONDENTS

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF FOR RESPONDENT BESTFOODS

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QUESTION PRESENTED

Section 107(a)(2) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA") imposes liability on any "person" who "operated" a "facility" that disposed improperly of hazardous substances. The question presented is:

Whether Congress, in providing that a corporation may be held liable under CERCLA as an "operator," intended to sweep aside longstanding principles governing the liability of parent corporations for the actions of their subsidiaries and to license the federal courts to develop *ad hoc* rules of corporate parent responsibility.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

On January 2, 1998, respondent CPC International Inc. changed its name to Bestfoods, following the spin-off of its corn-refining business into an independent company named Corn Products International, Inc. Corn Products International, Inc., is not at risk for any liability in this matter.

In addition to the parties listed in the caption, the respondents are Aerojet-General Corporation, Cordova Chemical Company of Michigan, Cordova Chemical Company, and the Michigan Department of Environmental Quality. The State agency formerly was known as the Michigan Department of Natural Resources. See No. 97-296 Pet. ii. For consistency with the proceedings in the courts below, we will refer to the State agency as "Michigan" or the "MDNR."

Respondent Bestfoods has no parent companies and has the following nonwholly owned subsidiaries:

Beigel & Beigel Mazon Ltd.
California Manufacturing Company, Ltd.
Corn Products Co. (India) Ltd.
CPC/AJI (Asia) Ltd.
CPC/AJI (Hong Kong) Ltd.
CPC/AJI (Malaysia) Sdn. Berhad
CPC/AJI (Singapore) Pte. Ltd
CPC/AJI (Taiwan) Ltd.
CPC/AJI (Thailand) Ltd.
CPC (Guangzhou) Foods Ltd.
CPC (Shanghai) Foods Ltd.
CPC Foods a.s.
CPC Foods Co., Ltd., Beijing
CPC France S.A.
CPC Middle East Holdings B.V.
CPC Monda N.V.-S.A.
CPC Tongaat Foods (Proprietary) Limited
Israel Edible Products Ltd. "TAMI"
Knorr Alimentaria S.A.
Maghreb Alimentation S.A.
P.T. Knorr Indonesia

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BRIEF FOR RESPONDENT BESTFOODS

STATUTORY PROVISION INVOLVED

In addition to the statutes appended to the Brief of the United States, the following statutory definition is relevant. In pertinent part, Section 9601(9) of Title 42 provides:

> The term "facility" means (A) any building, structure, installation, equipment, pipe or pipeline (including any pipe into a sewer * * *), well, pit, pond, lagoon, impoundment, ditch, landfill, storage container, motor vehicle, rolling stock, or aircraft, or (B) any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located * * *.

STATEMENT

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. § 9601 *et seq.* ("CERCLA"), imposes liability on "any person" who "operated" a "facility" where "hazardous substances were disposed of." The United States asserts that, in using the word "operated," Congress intended not only to hold liable the immediate operator of a facility, but also *sub silentio* to prescribe new federal rules for determining when parent corporations are liable for the actions of their subsidiaries. This Court only recently rejected, by unanimous vote, a similar attempt by the government to seize upon congressional silence to push aside fundamental but inconvenient doctrines of state law in order to minimize the government's burden of proof under a comprehensive federal regulatory scheme. See *O'Melveny & Myers* v. *FDIC*, 512 U.S. 79 (1994). The same result is warranted here.

A. Statutory Setting

This case involves the allocation of liability under CERCLA for the cleanup of a site near Muskegon, Michigan. CERCLA "seeks to facilitate government cleanup of hazardous waste discharges and prevention of future releases." *Exxon*

Corp. v. *Hunt*, 475 U.S. 355, 359-360 (1986). To that end, CERCLA required the federal government to implement a "national hazardous substance response plan," including a "National Priorities List" of sites most warranting attention, and created a "Superfund" to pay for cleaning up the most dangerous sites. 42 U.S.C. §§ 9605(a), (c); *id.* § 9611. CERCLA also created a comprehensive system of private obligations and liabilities. These provisions have been interpreted to impose retroactive liability on certain defined persons deemed responsible for the past — often, long-past — disposal of hazardous substances.

Like other provisions of CERCLA, those at issue in this case are "not * * * model[s] of legislative draftsmanship" and are "at best inartful and at worst redundant." *Exxon*, 475 U.S. at 363. CERCLA rendered liable for various costs of remediating contaminated facilities both the current "owner and operator of a * * * facility" and "any person who at the time of disposal of any hazardous substance owned or operated any facility." 42 U.S.C. § 9607(a)(1), (2).

The meaning of "facility" is clear enough: "any building, structure, * * * well, pit, pond, lagoon," or other "site or area where a hazardous substance has been deposited, stored, disposed of * * * or otherwise come to be located." 42 U.S.C. § 9601(9). For most facilities, however, CERCLA provides only a circular definition of "owner or operator": "any person owning or operating such facility." *Id.* § 9601(20)(A)(ii). In the case of abandoned facilities to which a State or local government has obtained title, the definition is expanded to include not only those who "owned" or "operated" the facility, but also any person who "otherwise controlled activities at such facility immediately before[]" the abandonment. *Id.* § 9601(20)(A)(iii). Excluded from the definition are persons who "hold[] indicia of ownership" — and thus otherwise would be "owners" — "primarily to protect [a] security interest in the * * * facility" but do not "participat[e] in the management of a * * * facility." *Id.* § 9601(20)(A).

B. Factual Background

Four separate successive owners manufactured chemicals at the Muskegon site: Ott Chemical Co. ("Ott I"), from 1957 to 1965; Ott Chemical Co. ("Ott II"), a wholly owned subsidiary of respondent Bestfoods (formerly CPC International Inc., and designated "CPC" here) from 1965 to 1972; Story Chemical Co., from 1972 until it went bankrupt in 1977; and two wholly owned subsidiaries of respondent Aerojet-General Corp. — Cordova Chemical Co. ("Cordova/California") and Cordova Chemical Co. of Michigan ("Cordova/Michigan") — from 1977 to 1986. Pet. App. 3a-5a.

1. Ott I manufactured a variety of synthetic organic chemicals at the Muskegon plant. See Pet. App. 63a. Arnold Ott, who founded the company and served as its president, and James Eiszner, vice-president of marketing, were among the company's top executives. See *id.* at 64a.

In 1963, Alexander MacFarlane joined the Ott I board. Pet. App. 64a. MacFarlane was chairman of CPC (then known as Corn Products Company), which specialized in wet-milled corn products. Two years later, a subsidiary of CPC purchased the assets of Ott I and then adopted the Ott name. *Id.* at 65a. In negotiating the asset sale, Ott I and CPC agreed that the Ott I management team would continue to direct the business of the new corporation, Ott II. C.A. App. 2906-2907, 3376-3380.

Ott II continued Ott I's operations at the Muskegon site (Pet. App. 66a); later, it also operated a chemical manufacturing plant in Charlotte, North Carolina. *E.g.*, C.A. App. 2329, 2334, 2340-2343. As the district court found, "[t]he officers of Ott II remained identical to the officers of Ott I[.] * * * Ott II continued to manufacture substantially the same products. Ott II continued to sell products to nearly all of Ott I's customers. Ott II continued to employ most of the same personnel as Ott I. And Ott II continued the same chemical manufacturing operation at the same facility." Pet. App. 66a.

In addition, the Ott II board of directors was "an active board during CPC's period of ownership, continuing the tradition established in the Ott I era of functioning in an engaged, participatory manner." Pet. App. 67a. In particular, "[t]he board established policies and goals for the company. It also regularly received reports and presentations from Ott II officers, including accounts of mounting problems with waste disposal." *Ibid.*

Ott and Eiszner assumed duties for CPC while retaining their positions with Ott II. Pet. App. 68a. Ott continued as president of Ott II through 1966 and was its CEO and chairman of the board through 1969. *Id.* at 68a, 70a, 72a. Ott remained on the Ott II board after he resigned from CPC in 1969 (C.A. App. 731) and continued to advise his successors in management — actions that the district court attributed to his former employer, CPC. See Pet. App. 73a.

2. CPC's acquisition of Ott I was a typical 1960s conglomerate acquisition. CPC acquired several companies in businesses that were unrelated to CPC's core businesses, wet-milled corn products and branded consumer foods. The acquired companies were loosely federated within the Corn Products Development Company ("CP Development"), a division of the parent corporation. Pet. App. 70a. CP Development oversaw six CPC subsidiaries (including Ott II) and a research center. C.A. App. 3325-3326, 3331-3332, 3419-3420. CP Development reviewed Ott II's financial performance, projections, and large capital expenditure requests. Pet. App. 72a-73a. Like any substantial investor, CP Development "exert[ed] pressure [on Ott II] to generate more profits and enhance performance." *Id.* at 72a.

Unsurprisingly, some officers of Ott II, including Ott and Eiszner (who succeeded Ott as president of Ott II), held positions in the division that oversaw Ott II and the other separate subsidiaries; Ott was the first president of CP Development. Pet. App. 72a. Eiszner's successor as president of Ott II, Beverly Warner, moved in the other direction, from president of CP Development to CEO of Ott II. *Ibid.* There was

no evidence, however, that CP Development and Ott II were in any sense an integrated enterprise.

3. Like virtually all parent corporations, CPC put some employees on its subsidiary's board of directors. Pet. App. 67a-68a. If Ott I carryover officers Ott and Eiszner are counted as CPC representatives, CPC employees at times made up a majority of the Ott II board. *Ibid.*; see C.A. App. 736-737. Only one of the CPC officers who served on Ott II's board was also a director of CPC (*id.* at 731-732, 736-737), however, and there was no evidence that CPC used its relationship as employer of some Ott II directors to control Ott II's corporate policy. To the contrary, as Ott II board minutes attest, CPC chairman MacFarlane made clear to the Ott II board members that CPC did "not want[ ] to 'meddle' with" Ott II. C.A. App. 2210.

Actual practice accorded with this policy. As the district court found, Ott II corporate officers set the day-to-day operating policies for the company without any supervision or approval by CPC: "[t]he Ott II management formulated and implemented the company's day-to-day operating policies" across the whole range of activities, "including sales, marketing, advertising, the purchase of raw materials, research and development, hiring and personnel policies, capital expenditures, manufacturing, and," significantly for present purposes, "environmental matters." Pet. App. 69a. Until 1970, those officers included *no* CPC employees not drawn from Ott I; indeed, at no time did more than two Ott II officers (out of nine) simultaneously hold positions with CPC. C.A. App. 738-740. Ott II did not routinely report its decisions to CPC personnel, much less seek their approval, except for the few large capital expenditures that CP Development was required to review. C.A. App. 2877, 3555-3560.

On a day-to-day basis, Ott II conducted its own business. Ott II hired and fired its own employees without consulting CPC. *E.g.*, C.A. App. 2908-2909, 3531-3532. Ott II had its own research and marketing staff; Ott II's officers and directors decided the type and volume of chemicals that Ott II produced.

Id. at 2365, 2918-2919. In addition, as the parties stipulated, Ott II maintained its own general and payroll bank accounts; its accounting and financial records were separate from CPC's, and were separately audited. *Id.* at 741-742, 3456-3458.

CPC did provide some incidental administrative and legal services over the years. Ott II obtained insurance, pension benefits, and tax and accounting advice through CPC, and was charged for the fair value of its share of those services on the inter-company accounts. C.A. App. 3199-3200, 3459. Ott II's general counsel did not come from CPC; indeed, Eiszner, as Ott II's president, successfully resisted the efforts of CPC's legal department to select Ott II's labor counsel. C.A. App. 1921, 2899, 3036-3037. When a union that also represented CPC employees sent in national-level negotiators to bargain with Ott II, however, CPC's labor negotiators assisted Ott II's counsel, but Ott II controlled the negotiating pertaining to its employees and made the final decisions regarding the labor agreement. C.A. App. 2897-2900, 3452-3455, 3540.

4. Upon beginning operations in 1957, Ott I obtained a permit from the Michigan Water Resources Commission ("MWRC") allowing it to discharge the wastewater from its manufacturing process into unlined seepage lagoons on the Muskegon property. C.A. App. 727; see Pet. App. 60a-61a. In 1965, several months before the sale to CPC, Ott I retained a consulting firm to propose possible solutions to wastewater supply and disposal problems and began a three-year process of negotiating with the MWRC about the appropriate change in disposal methods. C.A. App. 1805, 3389-3391.

Ott II continued those efforts. C.A. App. 1931, 1972, 1996. Ott II developed a long term waste disposal plan in 1966 and implemented the plan the following year. Although the Ott II board could not spend the full $375,000 on the plan until the CPC board approved that large expenditure, Ott II began implementing the plan without waiting for final approval. C.A. App. 734, 2184, 2190, 2194, 2801.

Ott II improved the waste disposal system in several ways. For example, it added and then redeveloped purge wells to confine and remove contaminated ground water, and it built an in-plant waste collection system and an equalization basin. C.A. App. 2228-2234. Ott II's state-of-the-art efforts to control its waste disposal were the subject of a technical journal article that concluded that the new system "achieved the goal of preserving the environment." Burt, *The Use, Abuse and Recovery of a Glacial Aquifer*, GROUND WATER, Jan.-Feb. 1972, at 65, 65. The new system went into operation in March 1968. C.A. App. 2232; see Pet. App. 60a.[1]

CPC was not involved in the design or implementation of these projects, which entailed close work with the consultants and a series of meetings with the MWRC. *E.g.*, C.A. App. 1953-1954, 2026-2027, 2031, 2045, 2145-2147; Exs. 91, 197, 255. In the year between September 1965 and September 1966, when Ott II was developing its new waste management plan with its consultants and was negotiating with the MWRC, no evidence reflects any communication from CPC to Ott II's employees or officers regarding waste disposal. C.A. App. 2868-2891, 2929-2933, 2936, 3392-3393, 3242-3248.

5. After CPC had agreed in principle on December 31, 1971, to sell Ott II to Story, CP Development essentially acted as Story's agent in overseeing Ott II. Pet. App. 72a, 74a. Although the day-to-day internal management of Ott II was unchanged (C.A. App. 3356), Ott II managers were "advised not to implement any changes in activity" without consulting

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[1] The district court asserted (Pet. App. 61a) that "hundreds of drums" were buried in an area of the Muskegon site. The government's post-trial investigation confirmed that the testimony to that effect was inaccurate. Extensive pretrial excavations in the area had uncovered only ten drums, filled mainly with empty glass bottles. Tr. 45-46, 1768, 1770-1772, 2564-2565, 2593-2594; Ex. 1327, at 3; Ex. 2338, at 83. After trial, EPA asked the witnesses who had made the dramatic allegations to pinpoint the area where the drums had been buried. They identified the same area investigated previously; further investigation uncovered no additional drums. See Proposed Trial Ex. 2443, CPC Motion to Amend the Court's Findings of Fact (Apr. 29, 1992).

CPC (Pet. App. 74a) so as to prevent the dissipation of assets for which Story had agreed to pay a set price (C.A. App. 3355); CPC had "undertaken" to perform such monitoring in its "sale agreement with Story." Knief Dep. 102.

CPC had reason to be concerned about ensuring that the business it conveyed to Story was in as good shape as had been portrayed. While negotiating with Story, CPC discovered that Ott II's profits had dipped substantially. C.A. App. 2349, 3344; Tr. 1436-1441. This discovery — the belated nature of which underscores the separation between CPC and Ott II — prompted CPC to direct Ott II management to avoid any further changes that might jeopardize the sale to Story. *Ibid.*

Story acquired Ott II in 1972 (Pet. App. 78a); nothing in the record indicates that any debts or other liabilities of Ott II remained unpaid at that time. See C.A. App. 2353. Within two years, Story ceased using the purge well system regularly, accelerating the contamination of the property. Pet. App. 78a.

The Michigan Department of Natural Resources (MDNR) turned its attention to the Muskegon site after Story's bankruptcy in 1977. Pet. App. 79a. MDNR sought a buyer for the Muskegon site that could contribute to the cleanup process. *Id.* at 81a. Aerojet, which sought a facility to make a chemical for its Cordova Chemical Company division, negotiated with MDNR and the bankruptcy trustee. *Id.* at 81a-82a. Aerojet incorporated the Cordova division as Cordova/California in October 1977; Cordova/California purchased Story's assets shortly thereafter, entering into a side agreement with MDNR. *Id.* at 82a-83a. Cordova/California incorporated Cordova/Michigan as a subsidiary in 1978, and transferred the Muskegon plant to the subsidiary. *Id.* at 94a. MDNR took responsibility for purging the groundwater and received appropriations for that purpose. Pet. App. 83a-91a; C.A. App. 2567, 2574. But MDNR never operated the purge wells. C.A. App. 766.

In 1982, EPA listed the Muskegon site on the National Priorities List. U.S. Br. 10. Although the government now describes the site as "acutely hazardous" (Br. 7), it did not

undertake any groundwater remediation there for 14 years; soil remediation, if any is necessary, has not yet begun.

C. Proceedings Below

1. In 1989, 17 years after CPC sold the Ott II assets, several CERCLA claims, counterclaims, and cross-claims were raised in a consolidated action in the United States District Court for the Western District of Michigan. In 1991, the district court held CPC, Aerojet, Cordova/California, and Cordova/Michigan jointly and severally liable for cleanup costs at the Muskegon site. Pet. App. 128a-129a.

Contrary to the government's assertion (Br. 11), the trial did not focus in any way on whether CPC actually operated the *Muskegon facility*. As the Sixth Circuit recognized (Pet. App. 18a), the government did not try to link CPC in any direct or immediate fashion to the "operation" of any "facility" at the Muskegon plant where waste had been deposited and needed to be cleaned up. Rather, the government and MDNR (along with Aerojet, their ally in the district court on the question presented here), tried the case on the theory that CPC "operated" *Ott II* through its influence at the highest levels of management.[2] Indeed, the government did not even ask the district court to find that CPC had "operated" the Muskegon "facility," relying instead on the broad assertion that "CPC participated in the management of the *activities of Ott II* and exercised control *over its subsidiary* and thus was an operator of the Site." U.S. & MDNR Proposed Findings of Fact and Conclusions of Law 9 (June 18, 1991) (emphasis added).

The district court held that CPC was liable as an "operator" of the Muskegon facility. In the district court's view, "section 107(a)(2) liability may attach to a parent corporation in two ways": direct liability, or liability through common law veil-

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[2] Aerojet advocated a broad rule of parent corporation "operator" liability in order to force CPC to share liability. Aerojet and its subsidiaries apparently are near (and now may have reached) a settlement agreement with the government and MDNR. See No. 97-296, U.S. Br. 9 n.4.

piercing. Pet. App. 103a-104a. The court concluded that the statutory term "operated" somehow "forge[d] a new, middle ground" of supposed "direct" liability (*id.* at 107a) — a "middle ground" that did not accord the full protection of the corporate form to any but the most passive parent corporations.

The district court defined its "new, middle ground" in these terms: "a parent corporation is directly liable under section 107(a)(2) as an operator" whenever "it has exerted power or influence over its subsidiary by actively participating in and exercising control over the subsidiary's business during a period of disposal of hazardous waste." Pet. App. 107a. Applying that test to "all the facts regarding CPC's *involvement with Ott II*" (*id.* at 110a (emphasis added)) — *not* to CPC's involvement with the day-to-day operations *of the Muskegon "facility"* — the court found CPC liable based on "active participation and control by CPC in Ott II affairs." *Id.* at 111a.[3]

The district court acknowledged that its decision was *ad hoc*: "In the final analysis, each case must be decided on its own unique facts and circumstances." Pet. App. 108a. The court focused on the presence of persons with ties to CPC in Ott II's upper management (principally, Ott and Eiszner), rather than on any CPC corporate involvement in manufacturing operations or waste disposal at the Muskegon facility. Pet. App. 65a-78a, 110a-112a. The court assumed that any officer or director of Ott II who also held a position at CPC performed his Ott II duties not as an agent of Ott II but as an agent of CPC. The court also noted that CPC had contributed cash to Ott II's expansion, had to approve large expenditures by Ott II, and on occasion had shared administrative and legal resources with Ott II (see *id.* at 76a-77a) — although in the same breath the court claimed that "monitoring of a subsidiary's financial performance, consolidation of corporate business matters such as accounting and legal work, and cooperation between the

[3] In light of this conclusion, the district court did "not reach the question of whether CPC should be held liable under CERCLA through common-law veil-piercing" (Pet. App. 112a).

subsidiary and the parent in research" were *not* activities that would normally support liability. *Id.* at 108a.

In addition, the district court identified three ways in which CPC "actively participated in Ott II environmental matters." Pet. App. 74a. First, as noted above, the court attributed to CPC as an entity all discussions about waste disposal by the Ott II board and management, because some Ott II officers and directors also held positions with CPC. Second, the court rested heavily on the participation of a CPC employee, G.R.D. Williams, in internal Ott II discussions and in a meeting with the MWRC involving Ott II environmental matters. Third, the court noted that a CPC attorney negotiated the use of a county wastewater treatment system for Ott II. *Id.* at 74a-76a.

Finally, the district court held that Aerojet was separately liable as the "present owner" of the facility, finding a basis under Michigan law to pierce Aerojet's corporate veil and charge the parent with the obligations of Cordova/Michigan, which owns the Muskegon site. Pet. App. 120a-122a; see 42 U.S.C. § 9607(a)(1).The court also held that Aerojet was liable as an "operator" of the Muskegon facility, concluding that "Aerojet's participation and control over * * * Cordova/California and Cordova/Michigan shows that the parent operated the facility." Pet. App. 124a.

2. The Sixth Circuit, sitting *en banc*, reversed the judgments holding CPC and Aerojet liable as "operators." Pet. App. 1a-24a. Unlike the district court, the court of appeals did not believe that "operator" liability could be imposed on a parent corporation based solely on an *ad hoc* analysis of "the degree of control exerted by the parent over its subsidiary." *Id.* at 18a. Certainly, "the degree to which [a parent] controls its subsidiary and the extent and manner of its involvement with the facility" could render a parent liable as an operator of a facility operated by its subsidiary. *Id.* at 15a. But the Sixth Circuit did not find anything in the definition of "operator" — "any person * * * operating such facility" — or elsewhere in CERCLA that "warrants the invocation by courts of vague, expansive

concepts, such as the district court's 'new, middle ground,' which threaten the efficacy of time-honored limited liability protections afforded by the corporate form." *Id.* at 13a-14a.

Accordingly, the Sixth Circuit held that a parent may be liable under Section 107(a)(2) only (a) "where the parent directly operates the facility itself, either independently of its subsidiary, or as an actual co-operator alongside the subsidiary" or (b) "by piercing the corporate veil" under state law (Pet. App. 17a; see *id.* at 15a). The court of appeals recognized that the first theory was "not * * * relied upon by the district court" and was "not supported by the facts in the record" in any event. Pet. App. 18a. Applying the veil-piercing standard, the court of appeals held that there was no support in the record for imposing "operator" liability on either CPC (*id.* at 16a-18a) or Aerojet (*id.* at 22a). With respect to CPC, the court of appeals noted that the factors on which the district court relied revealed only "a parent that took an active interest in the affairs of its subsidiary"; CPC's behavior towards its subsidiary did not "indicate such a degree of control that the separate personalities of the two corporations ceased to exist" or that CPC used "the corporate form to perpetrate the kind of fraud or other culpable conduct required before a court can pierce the veil." *Id.* at 17a.

SUMMARY OF ARGUMENT

The government's construction of "operated" in 42 U.S.C. § 9607(a)(2) suffers from two fatal flaws. First, it strains the normal definition of a commonplace word for no purpose other than to ease the government's burden of proving liability. Second. it creates from whole cloth a federal standard to displace well-developed doctrines of state common law. There is no evidence that Congress intended courts, in applying CERCLA, to devise *ad hoc* federal rules for determining when the activities — here, the waste disposal — of a corporate subsidiary may be ascribed to its parent.

Under the ordinary understanding of the term "operator," CPC's subsidiary Ott II was the "person" that "operated" the

Muskegon "facility" from 1965 to 1972, and the district court so found. Pet. App. 59a. The Muskegon site was used exclusively during that period to produce chemicals sold by Ott II. Nothing in the language or legislative history of CERCLA suggests an intent to extend liability beyond those persons immediately "operating" a "facility" to reach persons who in some way controlled or participated in managing a separate corporate "person" that in turn operated the facility. Indeed, the structure of CERCLA affirmatively excludes the "participation" and "control" gloss that the government would lay on the word "operator." Other provisions of CERCLA use those criteria to alter the core definition of "owner or operator," but Congress limited the applicability of those criteria to narrow circumstances not presented here. Moreover, Congress has repeatedly demonstrated its ability to incorporate concepts of "control" into a statutory basis of liability, but it did not do so here.

Nonetheless, the government asserts that CPC also "operated" Ott II's facility, because CPC participated in the affairs of Ott II. There is more than a century of well-developed law that determines when a corporation may be said to have acted through a subsidiary corporation that was the immediate actor. Although Congress quite clearly intended corporations to be separate "person[s]" subject to CERCLA liability (42 U.S.C. § 9601(21)), nowhere did it manifest an intent to supplant the firmly established rules of corporate parent responsibility.

The government denies that any corporate entity question exists. The cornerstone of its argument, however, is that because some officers and directors of Ott II held positions with CPC, all of Ott II's conduct may be attributed to its parent. That contention necessarily assumes away a question of corporate entity law that the common law resolves in a contrary manner. Thus, the government's purported "plain language" argument rests on an unstated assumption that a new federal common law of the corporate entity has silently taken effect.

Once that fallacious presumption is cast aside — as it must be under *O'Melveny & Myers* v. *FDIC*, 512 U.S. 79 (1994) —

no plausible basis for "direct" operator liability remains, as the Sixth Circuit correctly found. Pet. App. 17a-18a. Contrary to the government's submission, CERCLA provides no basis for federal courts to create a specialized federal common law of corporations in order to provide a "new, middle ground" of liability for parent corporations of corporate "operators."

To make matters worse, the government does not bother to set forth any discernible and predictable legal rule to guide the courts in applying its "active participation and control" test, but simply declares open season on parent corporations that follow the common practice of exercising control over their subsidiaries. Exposing almost all parent corporations to a risk of liability under CERCLA would have severe adverse consequences — consequences that this Court should hesitate to impose without a strong showing that Congress desired that result.

It is, of course, the law of the states that actually determines when a corporate parent's actions with respect to a subsidiary may render the parent liable for the subsidiary's conduct. The Sixth Circuit held, and the government does not dispute, that CPC had not so involved itself in Ott II's affairs to render itself liable for Ott II's operations under Michigan law. The judgment therefore should be affirmed.

ARGUMENT

CONGRESS'S USE OF THE WORD "OPERATOR" IN CERCLA WAS NOT INTENDED TO CREATE A NEW FEDERAL RULE FOR DETERMINING WHEN A PARENT CORPORATION IS RESPONSIBLE FOR THE ACTIONS OF ITS SUBSIDIARY

In seeking to hold CPC liable under CERCLA for any disposal of hazardous substances that occurred at the Muskegon facility operated by Ott II, the government relies (as did the district court) on a "new, middle ground" of liability (Pet. App. 107a) that greatly expands the traditional responsibility of a parent corporation for the operations of its subsidiary. In the government's view, by rendering "operators" liable for waste

disposal at a "facility," Congress silently discarded more than a century of state common law jurisprudence determining when the actions of a corporate subsidiary may be attributed to its parent and authorized federal courts to create a new standard "of federal corporate law from whole cloth." *Kamen* v. *Kemper Financial Services, Inc.*, 500 U.S. 90, 99 (1991) (quoting *Burks* v. *Lasker*, 441 U.S. 471, 480 (1979)). The government's position is insupportable and should be rejected.

A. In Its Statutory Context, "Operator" Signifies The "Person" Who Conducts The Activities Resulting In Disposal At A Covered "Facility" Whether Or Not That Person Owns The Facility

As in all matters of statutory interpretation, the starting place here is "the language of the statute." *Bailey* v. *United States*, 116 S. Ct. 501, 506 (1995). The statutory definition of "operator" — "any person * * * operating [a] facility" (42 U.S.C. § 9601(20)(A)) — is "completely circular and explains nothing." *Nationwide Mutual Insurance Co.* v. *Darden*, 503 U.S. 318, 323 (1992). Accordingly, the word "operator" must be given "its ordinary or natural meaning," considered in light not only of "the bare meaning of the word but also its placement and purpose in the statutory scheme." *Bailey*, 116 S. Ct. at 506 (internal quotation marks omitted).

As it did in *Bailey*, the government offers a sweeping and unnatural gloss on a commonplace term. This time, the government defines "operator" not only to encompass the corporation that immediately operates a facility but also to include (under an amorphous federal common law test) any "person" that controls that corporation. The government contends (Br. 37-38), without support, that Congress imposed liability on "operators" as well as "owners" precisely to hold parent corporations liable when their subsidiaries owned and directly operated waste sites. But the word "operator" cannot bear that freight. Congress in enacting CERCLA did not evidence the slightest intent to alter settled state law governing when the acts of one corporation may be said to be those of another.

1. *The Plain Meaning Of "Operator" Does Not Support The Government's View*

a. The everyday sense of "operator," when contrasted with the word "owner," is simpler and more restricted than the government claims. The "operator" is the person that directly runs a machine, a business, or (as here) a disposal "facility," but does not necessarily own the equipment being operated or the real estate where the operations take place. The district court understood the word in that way, stating at the outset of its opinion that the Muskegon "site was owned and operated by * * * Ott Chemical Company ('Ott II')." Pet. App. 59a. Many businesses operate facilities they do not own, and many businesses own facilities they do not operate. CERCLA's liability scheme simply ensures that, where a facility's owner was not the same person as its operator, both would be answerable for clean-up costs. Contrary to the government's contention (Br. 37, 38), "operator" liability does not speak at all to the liability of parent corporations or other shareholders of "operators."

The Act to Prevent Pollution From Ships, enacted six weeks before CERCLA, provides insight into the meaning that the CERCLA Congress assigned to the common terms "owner" and "operator." That statute separately defined "owner" and "operator," clarifying that "operator" simply covered "any * * * person, except the owner, * * * responsible for the operation" of a ship or terminal. 33 U.S.C. § 1901(a)(7).

Many other statutes reflect the same unadorned understanding of an "operator." State motor vehicle laws commonly refer to both "owners" and "operators" in imposing obligations on both the owner of a vehicle as well as the person actually driving it.[4] The same idea underlies the use of "owner" with "operator" to hold liable both a shipowner and the person or

[4] See, *e.g.*, *State Farm Mutual Automobile Insurance Co.* v. *Coughran*, 303 U.S. 485, 488 (1938) (quoting typical statute defining operator as one who "drives, operates, or is in actual physical control of a motor vehicle").

company directly in charge of the vessel, as in CERCLA itself.[5] Mining laws provide another typical context in which the owner of the mined land (or of the mining claim) often is not the person conducting mining operations, yet both are legally responsible for activities at the mine.[6] Other federal statutes likewise use "operator" or "operates" in the same way to identify a non-owner who is the immediate, on-site person or entity conducting the relevant activities at a facility.[7]

This Court has used "operator" in the same, everyday sense, especially when that word appears in conjunction with "owner." This Term, the Court noted that the respondents in *State Oil Co.* v. *Khan*, 118 S. Ct. 275, 278 (1997), "lease[d] and operate[d] a gas station and convenience store owned by State Oil."[8] The Court earlier explained that certain companies that "owned and operated" railroads also "owned and worked" their own coal lands, while others "not only owned, but also leased and operated" coal mines. *United States ex rel. Attorney General* v. *Delaware & Hudson Co.*, 213 U.S. 366, 392-393 & n.† (1909). In these and other usages the Court has not

[5] See 42 U.S.C. § 9601(20)(A)(i); see also 33 U.S.C. §§ 409, 414(b) (duties and liabilities of "owner, lessee, or operator" of sunken vessels).

[6] *E.g.*, *Plymouth Coal Co.* v. *Pennsylvania*, 232 U.S. 531, 533 (1914) (quoting state mining law defining "operator" as the "immediate proprietor or lessee or occupier"). See 10 OXFORD ENGLISH DICTIONARY 851 (2d ed. 1989) (citing 1881 mining glossary that defines an "operator" as "[T]he person, whether proprietor or lessee, actually operating a mine or colliery").

[7] See, *e.g.*, 7 U.S.C. §§ 1922(a), 1941(a) (operators of family farms); 26 U.S.C. § 3121(g)(2) ("the owner or tenant or other operator of a farm"); 29 U.S.C. § 213(c)(1)(A) (child employed "on a farm owned or operated by [his] parent"); 35 U.S.C. § 202(c)(7) ("Government-owned-contractor-operated facility"); 40 U.S.C. § 481(b)(2)(B) ("federally owned and contractor operated * * * facilities").

[8] A 1986 amendment to CERCLA uses "owns or operates" in exactly this sense. See 42 U.S.C. § 9601(37) (defining "service station dealer" as any person "who owns or operates a motor vehicle service station").

suggested that the term "operator" applied to anyone other than the legal entity actually engaged in the operations at issue.[9]

b. Other terms in CERCLA reinforce this commonsense meaning of "operator" as opposed to a meaning directed at the liability of parent corporations (see U.S. Br. 37-38). In particular, CERCLA ties "operating" closely to the "facility" for which remediation is sought, *i.e.*, the structure, lagoon, or other area where hazardous substances were released. See 42 U.S.C. §§ 9607(a)(2), 9601(9). The proper meaning of "operator" relates to this specific, concrete statutory context. Compare *Bailey*, 116 S. Ct. at 505 (limiting "use" of a gun in relation to drug crimes to "active employment of the firearm" by the defendant) with *Astor* v. *Merritt*, 111 U.S. 202, 213-215 (1884) (for purposes of customs laws, "actual use" of apparel not limited to clothing already worn).[10]

The only "operating" that matters, therefore, is the actual physical "operating" of the "facility" where hazardous substances were placed, not the "operating" of a subsidiary through its officers and directors.[11] Although the district court plainly

[9] *E.g.*, *Transcontinental Gas Pipe Line Corp.* v. *State Oil & Gas Board of Mississippi*, 474 U.S. 409, 412, 426 (1986) (owners, including "nonoperator owners," and operators of natural gas wells); *Shepard* v. *NLRB*, 459 U.S. 344, 345 (1983) (petitioner "owns a dump truck, and operates it" to haul materials to construction sites); *United States* v. *Swank*, 451 U.S. 571, 573 (1981) ("[e]ach taxpayer operated a coal mine pursuant to a written lease").

[10] The immediate sense of "operating" a "facility" is consistent with the statutory assumption that, in the run of cases, there would be only one "owner" and one "operator" of a "facility" at any given time. The most prominent example is the provision imposing liability on "*the* owner and operator of a * * * facility." 42 U.S.C. § 9607(a)(1) (emphasis added). See also, *e.g.*, *id.* § 9611(g) (duty of "the owner and operator" to notify public of release of any hazardous substance); *id.* § 9612(a) (requiring presentation of claims to "the owner, operator, or guarantor" of a facility). Under the government's theory, there frequently would be simultaneous operators of the same facility.

[11] The dictionary definitions on which the government relies (Br. 20-21) confirm a limited and concrete sense of the terms "operate" and "operator" — the person that "works" or "manages" a business or, as here, a "facility"

overlooked this distinction, and the government repeatedly tries to blur it, this Court long ago distinguished between *operating* a subsidiary's *facility*, in that case a railroad, and *controlling* the subsidiary *company*. After noting that the parent held virtually all of the subsidiary's stock, and that the same individuals held positions as directors and management officials within the two companies, the Court nonetheless concluded that the separately incorporated subsidiary "operate[d] its own road." *Pullman's Palace Car Co.* v. *Missouri Pacific Ry.*, 115 U.S. 587, 589, 596 (1885). Although "[p]ractically [the parent] may control the [subsidiary] company, * * * the [subsidiary] alone controls its road." *Id.* at 597.[12] *That* meaning of "operates" — "in * * * immediate control of" (*ibid.*) a facility covered by CERCLA — accords both with common sense and with precedent.

Contrary to the impression fostered by the government (Br. 11, 18, 45), the district court did *not* rest CPC's liability on any purported involvement in the day-to-day operations of the "facility," *i.e.*, the areas where hazardous substances were put. Rather, at the government's urging, the district court concentrated on whether CPC had somehow "operated" its *subsidiary*, which, the court recognized, was fully responsible for day-to-day operations at the Muskegon plant. Pet. App. 69a. The district court relied on "all the facts regarding CPC's *involvement with Ott II*" (*id.* at 110a (emphasis added)), and held CPC liable not for operating the Muskegon facility but for allegedly "operating" Ott II by "permeat[ing] the board, management and

within a business operation. Those definitions therefore weigh against the government's argument for an abstract and intermediated meaning of "operator." See also WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1581 (1986) (defining "operator as "one that engages himself in the mechanical aspect of any process or activity").

[12] Compare *Costan* v. *Manila Electric Co.*, 24 F.2d 383, 385 (2d Cir. 1928) (parent "was actually operating the railway of its subsidiaries" where parent, without action by subsidiaries' boards of directors, contracted with management company to hire personnel and purchase supplies necessary to run railway, subject to supervision only of parent's board of directors).

decision making of a wholly owned subsidiary" (*id.* at 111a-112a) — a conclusion that itself was unsustainable. Indeed, the government describes (Br. 41) its own analysis as addressing a stockholder's involvement in the "operation of a *subsidiary*" first and of a "facility" second, if at all.

In effect, the government asks the Court to rewrite CERCLA to impose liability upon a person that "operates" another legally separate person that in turn operates a "facility." But this Court prefers statutory constructions that rely on the "normal and usual meaning" of words rather than those that strain a simple word to cover a complex "two-stage" process. See *FTC* v. *Sun Oil Co.*, 371 U.S. 505, 514-516 (1963).

c. For similar reasons, there is no merit to the suggestion (U.S. Br. 19; Mich. Br. 8-9) that Congress silently abrogated the usual protections of the corporate form by including corporations among the "persons" that may be "operators" under CERCLA. See 42 U.S.C. § 9601(21). That inclusion simply makes clear that entities such as Ott II may be liable as operators. Terms with "settled meaning[s] under . . . the common law" are presumed to "incorporate the established meaning," *Darden*, 503 U.S. at 322, but "[t]he term 'corporation' does not include stockholders" such as a separate parent corporation, "and a statute imposing a liability upon the corporation does not thereby impose the same upon the stockholders." *Park Bank* v. *Remsen*, 158 U.S. 337, 346 (1895).

Congress easily could have specified "parent corporation of any person" or "shareholder of any person" in the definition if it wanted to go beyond the usual scope of corporate liability, but it did not. As this Court held of an earlier Congress's omission of any reference to subsidiary corporations, "the failure to provide for such a contingency in express language gives rise to the implication that it was not the purpose to include it." *Delaware & Hudson*, 213 U.S. at 414. Congress's silence leaves state law to supply the scope of corporate liability, just as state law defines the status of a corporation and the other entities identified as "person[s]." See *Darden*, 503

U.S. at 322; *CTS Corp.* v. *Dynamics Corp. of America*, 481 U.S. 69, 89 (1987) ("existence and attributes" of corporations "are a product of state law").

2. *The "Participation And Control" Test Engrafts Onto The Definition Of "Operator" Two Criteria That The Language And Structure Of The Statute Exclude*

The statutory definition of "owner or operator" is purely circular: "any person owning or operating such facility," no more, no less. 42 U.S.C. § 9601(20)(A)(ii). "[I]t is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another." *City of Chicago* v. *Environmental Defense Fund*, 511 U.S. 328, 335 (1994) (internal quotation marks omitted). The government turns this settled rule on its head by insisting that parent liability should be assessed using elements of two adjacent definitions — "participation in the management" and "control" — that *alter* the core meaning of "owner or operator" applicable to this case.

To support its claim that "operating" is equivalent to any form of "control," the government relies (Br. 26-28) on a definition that applies only when a governmental authority has come into possession of a facility through *abandonment* or other default. 42 U.S.C. § 9601(20)(A)(iii). In that instance, to be sure, the statute imposes liability on "any person who * * * operated[ ] or *otherwise* controlled activities" at the facility immediately before abandoning it.[13] *Ibid.* (emphasis added). But that *expansion* of the scope of liable persons, designed to discourage (or, at least, to punish) abandonment of disposal sites, shows only that to be an "operator" requires "something more" (*Saudi Arabia* v. *Nelson*, 507 U.S. 349, 358 (1993)) than abstract "control" — otherwise, there would have been no need

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[13] The government offers no support for its speculation (Br. 27) that "Congress recognized that such facilities were likely to be non-operational for some time prior to their abandonment," nor does it explain why, even in that case — if "control" truly amounts to "operation" — Congress would not just have imposed liability on whoever "operated" the facility.

to add "otherwise controlled activities" to the definition.[14] The Sixth Circuit correctly understood that, by this juxtaposition, "the drafters of the statute distinguished an operator from a person who 'otherwise controlled' a facility." Pet. App. 13a; see *Joslyn Manufacturing Co.* v. *T.L. James & Co.*, 893 F.2d 80, 83 (5th Cir. 1990), cert. denied, 498 U.S. 1108 (1991).

The language of CERCLA also defeats the argument (U.S. Br. 22-25) that "participating in the management" of a subsidiary renders a parent corporation liable as an operator of the subsidiary's facility. That phrase, too, is part of a definition of "owner or operator" that does *not* apply to this case. The statute provides that a person who appears to be the legal owner of a facility (*i.e.*, "holds indicia of ownership"), but who actually holds only a security interest in the property "without participating in the management of a * * * facility," is not subject to liability. 42 U.S.C. § 9601(20)(A). Thus, Congress restricted liability for merely "participating in the management of a * * * facility" to persons who, but for the operation of the security interest exception, would be liable as owners. *Ibid.*[15]

The government cannot explain why parties like CPC, who do not hold any "indicia of ownership" pertaining to a covered "facility," should be held liable as *operators* because they do not meet a criterion for an irrelevant *exemption* from *owner* liability. Indeed, if "participating in the management" transformed someone into an "operator," the secured lender exception could have been written more simply: exempting any holder of a security interest "unless that person operates the vessel or facility." In view of the statute that Congress *did* enact, however, "[t]he only reasonable reading of the * * * term" *operator* again "calls for something more." *Nelson*, 507 U.S. at 358.

The government truly grasps at straws when it asserts (Br. 23-25) that the 1996 amendments that expand upon the exception from owner liability somehow shed light on the intent of the 1980 Congress in enacting the definition of "operator." To begin with, as this Court has "often observed, * * * the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *South Dakota* v. *Yankton Sioux Tribe*, 118 S. Ct. 789, 803 (1998) (internal quotation marks omitted). Moreover, the recent amendment is irrelevant: by its terms it, too, applies only to persons who "hold[] indicia of ownership" in a facility, and thus does not affect the core definition of "operator" at issue here.[16]

In sum, it is illogical to derive the positive meaning of "operator" by combining an *exception* to an *exemption* from owner liability with a term that the statute *contrasts* with "operat[ing]." To paraphrase *Sun Oil* (371 U.S. at 515), "[t]here

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[14] The "otherwise controlled" language does not appear in the parallel provision of the Clean Water Act applying to abandoned facilities, 33 U.S.C. § 1321(a)(6)(C). The CERCLA Congress's insertion of that language to apply only to abandoned facilities could not have been inadvertent. By contrast, in the Black Lung Benefits Act, Congress *did* define operator broadly to incorporate "control" of other persons, extending the definition of mine "operator" to "any owner, lessee, or other person who operates, controls, or supervises a coal * * * mine or any independent contractor performing services or construction at such mine." 30 U.S.C. § 802(d).

[15] This exception originally appeared in a separate definition of "owner." See H.R. 85, § 101(x), 96th Cong., in 2 SEN. COMM. ON ENV'T & PUB. WORKS, 97TH CONG., LEGISLATIVE HISTORY OF [CERCLA] 1022 (Comm. Print 1983).

[16] In any event, under the standard set forth in the secured-lender amendments, CPC did not "participate in the management" of the Muskegon "facility." Tellingly, the amendments did not identify representation within an "operator's" board of directors or officers as a factor relevant to the inquiry. And CPC surely did not "undertake[] responsibility for [Ott II's] hazardous substance handling or disposal practices." 42 U.S.C. § 9601(20)(F)(ii)(I). In addition, sporadic advice or assistance given by CPC personnel to Ott II in environmental matters did not control "the day-to-day decisionmaking" for Ott II's "environmental compliance." Moreover, even *assuming away* the corporate entity by attributing all dual officers to CPC and not to Ott II, the CPC board and management never accounted for "substantially all of the operational functions" of Ott II — functions that include "facility or plant manager, operations manager, chief operating officer, or chief executive officer" — but rather occupied only one or two high management positions. *Id.* § 9601(20)(F)(ii)(II), (G)(v).

is no reason appearing on the face of the statute to assume that Congress intended to invoke by omission in [Section 9601(20)(A)(ii)] the same broad meaning of ['owner or operator'] which it explicitly provided by inclusion" in the very next sentences; "the reasonable inference is quite the contrary." The omission "strongly suggest[s] a deliberate decision." *Key Tronic Corp.* v. *United States*, 511 U.S. 809, 818-819 (1994).

3. *Congress Has Explicitly Addressed Corporate Control And Affiliation When That Was Its Intent*

The government's attempt to use the meaning of "operator" to support an indistinct, trans-entity "control" analysis is particularly inappropriate in light of the many federal statutes that directly address the parent-subsidiary (or shareholder-corporation) relationship or use "control" as an explicit criterion for liability. Certainly, as the Sixth Circuit observed, "[i]f Congress wanted to extend liability to parent corporations" under CERCLA in a non-traditional way "it could have done so." Pet. App. 14a (quoting *Joslyn*, 893 F.2d at 83). But Congress overrode state law pertaining to corporate "common ownership or affiliation" or "legal form" only in a 1986 amendment that preempted state limitations on the formation of purchasing groups for pollution liability insurance. 42 U.S.C. § 9674(a)(5).

Congress has not been cryptic when it has wanted to impose some version of a "control" test as a replacement for the traditional standards governing the responsibility of a parent corporation for the acts of its subsidiary. For example, the Securities Exchange Act of 1934 puts the issue in these terms:

> Every person who, directly or indirectly, controls any person liable under any provision of this chapter * * * shall also be liable jointly and severally with and to the same extent as such controlled person.

15 U.S.C. § 78t(a). In terms contrasting with the narrower "owner or operator" language of CERCLA, Congress long ago closed the Panama Canal to any ship "owned, chartered, operated, or controlled" by a person violating the antitrust laws.

15 U.S.C. § 31. See also 45 U.S.C. § 702(14) (distinguishing assets "controlled by a railroad in reorganization" from those "owned, operated, or leased by a railroad in reorganization"). Several other federal statutes, unlike CERCLA, expressly assign liabilities or deny benefits to corporations based on their affiliation or common control with other companies.[17]

Indeed, in the specific context of owners or operators of hazardous waste facilities, Congress has used a "control" standard when it intended one: a tax provision relevant to the financing of a "qualified hazardous waste facility" specifically distinguishes between "the owner or operator of such facility" and "any related person * * * to such owner or operator" (26 U.S.C. § 142(h)(2)(A), (B)), defined as "members of the same controlled group of corporations" (*id.* § 144(a)(3)(B)). Against this backdrop, CERCLA's silence on the issue of control-person, parent-corporation, or shareholder liability "is most eloquent" and should be dispositive evidence that Congress did not intend, without saying so, to work "an important and controversial change in existing law" by altering the treatment of the corporate form. *Edmonds* v. *Compagnie Generale Transatlantique*, 443 U.S. 256, 266-267 (1979).

The government therefore is quite misguided in insisting (Br. 17) that "Congress is entitled to enact legislation that creates a federal liability standard that applies without regard to considerations of the corporate form." The relevant question relates not to Congress's *power*, but to Congress's *intent*. Congress certainly could have supplanted traditional corporate responsibility rules in enacting CERCLA, but there is absolutely no evidence that it meant to do so.

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[17] See, *e.g.*, 12 U.S.C. §§ 3201-3207 (regulating corporations "affiliated" with depository institutions); 26 U.S.C. § 1239(b)(1) (denying depreciation allowance to transactions between a person and "controlled entities with respect to such person"); Fair Labor Standards Act, 29 U.S.C. § 203(r) (explicitly applying "enterprise" principles to entities under "common control"); ERISA, 29 U.S.C. § 1301(b) (treating businesses "under common control" as a "single employer").

4. *The Legislative History Additionally Supports Construing "Operator" According To Its Everyday Sense*

If further support were needed, the legislative history of CERCLA indicates that "operator" was used in its ordinary sense to mean the person immediately conducting activities at a facility, irrespective of ownership. As this Court has noted, CERCLA was cobbled together from three bills after the 1980 election. See *Exxon*, 475 U.S. at 365-366, 368. The two that defined "owner" or "operator" indicate that Congress intended "operator" to have a traditional meaning rather than the aberrational one advanced by the government (Br. 37-38).

The Senate bill incorporated the circular definitions of "owner or operator" used in the Clean Water Act, 33 U.S.C. § 1321(a)(6). See S. 1480, 96th Cong., § 2(b)(1), in 1 SEN. COMM. ON ENV'T & PUB. WORKS, 97TH CONG., LEGISLATIVE HISTORY OF [CERCLA] 463 (Comm. Print 1983) ("LEG. HIST."). Congress in enacting CERCLA chose to model the definition of "owner or operator" on the definition in Section 311 of the Clean Water Act, 33 U.S.C. § 1321(a)(6), rather than on the definition of "owner or operator" in Section 306 of that Act, 33 U.S.C. § 1316(a)(4). The definition that Congress did *not* choose — "any person who owns, leases, operates, controls, or supervises" (*ibid.*) — contains the additional elements that the government would read into the more limited definition that Congress *did* choose.

The relevant House bill also modeled its definitions on the Clean Water Act. H.R. 85 defined "operator" as,

> in the case of a facility, any person, except the owner, responsible for the operation of the facility by agreement with the owner.

H.R. 85, 96th Cong. § 101(z)(2) (1980), in 2 LEG. HIST. at 1022. Unlike CERCLA, however, H.R. 85 also explicitly addressed the issue of related companies: it excluded from the definition of "owner" any passive lessor to another person with

which the lessor was "not otherwise affiliated," *id.* § 101(x), and defined "affiliated" as "a relationship in which a person owns * * *, is owned by * * * , or is under common control with, another person." *Id.* § 101(y), 2 LEG. HIST. at 1022.

Elsewhere the close link between "operator" liability and immediate responsibility for the release of hazardous substances is equally clear. The Senate Report noted a concern to broaden federal "authority to sue *the disposer or owner* of the disposal site to seek clean up." S. REP. NO. 96-848, at 11 (1980), in 1 LEG. HIST. at 318 (emphasis added). A Senate sponsor and the Administration each stated that the liability provisions reached "*those who release hazardous substances,*" see 1 LEG. HIST. at 685 (statement of Sen. Randolph) (emphasis added), or "*persons involved in handling hazardous substances*." Letter from Assistant Attorney General Parker to Rep. Florio (Dec. 1, 1980), in 1 LEG. HIST. at 780 (emphasis added). The legislative history, then, confirms that Congress viewed an "operator" as the person actively involved in waste-related activities at a facility — not as a person at one or more removes with some form of control over the immediate "operator."

It also is worth noting that CERCLA "represent[ed] an extremely delicate balancing of interests." Letter from Sens. Stafford and Randolph to Rep. Florio (Dec. 2, 1980), in 1 LEG. HIST. at 774. As the Senate sponsors put it: "Had we changed a com[m]a or a period, the bill would have failed." *Id.* at 774-775. That is yet another reason to give the language Congress chose its ordinary meaning rather than an adventurous one that no legislator could have anticipated.

B. CERCLA Does Not Evince Clear Intent To Supplant The State Common Law Of Limited Liability Of Corporations

As this Court has repeatedly observed, "Congress acts . . . against the background of the total *corpus juris* of the states." *Atherton* v. *FDIC*, 117 S. Ct. 666, 670 (1997) (quoting *Wallis* v. *Pan American Petroleum Corp.*, 384 U.S. 63, 68 (1966)).

When "federal statutory regulation * * * is comprehensive and detailed," as CERCLA undeniably is, "matters left unaddressed in such a scheme are presumably left subject to the disposition provided by state law." *O'Melveny*, 512 U.S. at 85. See *Atchison, Topeka & Santa Fe Ry.* v. *Brown & Bryant, Inc.*, 132 F.3d 1295, 1300 (9th Cir. 1997) (applying *O'Melveny* to liability of a corporation alleged to be successor to a CERCLA "operator"). This Court does not presume that federal statutes repeal underlying doctrines of state common law unless the statutory language on the point is "clear and explicit" (*Norfolk Redevelopment & Housing Auth.* v. *Chesapeake & Potomac Telephone Co.*, 464 U.S. 30, 35 (1983)) and addresses the narrow issue at hand. See *Oubre* v. *Entergy Operations, Inc.*, 118 S. Ct. 838 (1998). "Congress has never indicated that the entire corpus of state corporation law is to be replaced simply because a plaintiff's cause of action is based upon a federal statute." *Burks*, 441 U.S. at 478. These principles are dispositive here: CERCLA speaks only to the type of disposal that renders a "person" strictly liable, and not at all to the relationships between corporate "persons."

The government seeks to deflect consideration of the underlying state common law regarding corporate entities by asserting that its interpretation of "operator" simply holds parent companies liable for *their own* acts rather than the acts of their subsidiaries. But the government gives away the game by making clear, as did the district court, that its supposed statutory interpretation charges to *CPC* every act taken by an *Ott II* officer or director who also happened to hold a position with CPC. Assigning liability to CPC on that basis necessarily *assumes* a federal common law of corporations that overrides established state law protections of the corporate entity. That is because, under well-settled common law, dual officers and directors are *not* presumed to be agents of the parent when they act in their capacities with the subsidiary, unless their decisions for the subsidiary were dictated by the parent or there is other

evidence that they sacrificed the subsidiary's interests to favor those of the parent.[18]

The government can point to nothing in CERCLA that manifests any intention to override these common-law principles. Because Congress did not "speak directly to the question," unless a contrary legislative intent is "evident" statutes that, like CERCLA, "invade the common law . . . are to be read with a presumption favoring the retention of long-established and familiar principles." *United States* v. *Texas*, 507 U.S. 529, 534 (1993) (internal quotation marks omitted); *BFP* v. *Resolution Trust Corp.*, 511 U.S. 531, 543 (1994). That presumption applies to the "long-established and familiar" standards for disregarding a separate corporate entity based on the involvement of a parent or other stockholder in the corporation's affairs.

The state-law principles at issue are scarcely arcane or obscure. Limited liability through the use of the corporate form "is ingrained in our economic and legal systems." Douglas & Shanks, *Insulation from Liability Through Subsidiary Corporations*, 39 YALE L.J. 193, 193 (1929). The standards for removing the protections of the corporate entity by piercing the corporate veil are equally "ingrained." Moreover, strong policies favor the retention of state law in the absence of clear congressional intent to displace it. This Court has instructed that "federal courts should incorporate state law as the federal rule of decision * * * particularly * * * in areas in which private parties have entered legal relationships with the expectation that their rights and obligations would be governed by state-law standards." *Kamen*, 500 U.S. at 98 (citation and internal quotation marks omitted). That certainly is the case where, as here, a corporation invests in a discrete business by acquiring a separate subsidiary corporation and respects the

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[18] See, *e.g.*, *Lusk* v. *FoxMeyer Health Corp.*, 129 F.3d 773, 779 (5th Cir. 1997); *United States* v. *Jon-T Chemicals, Inc.*, 768 F.2d 686, 691 (5th Cir.), cert. denied, 475 U.S. 1014 (1985); *Wiseman* v. *United Dairies*, 324 Mich. 473, 37 N.W.2d 174, 182 (1949).

separate status of the subsidiary according to the applicable state-law standards. As a consequence, the Sixth Circuit was correct to apply the "traditional concepts of limited liability associated with the corporate form" (Pet. App. 12a).

1. *The Government Unjustifiably Presumes That CERCLA Silently Displaces The Common Law Treatment Of Dual Officers*

At the outset, the government completely ignores "the well established principle that directors and officers holding positions with a parent and its subsidiary can and do 'change hats' to represent the two corporations separately, despite their common ownership." *Lusk* v. *FoxMeyer Health Corp.*, 129 F.3d 773, 779 (5th Cir. 1997). Courts, including this Court, routinely recognize the dual nature of the duties and responsibilities of these individuals. The presumption is that the individuals' acts taken in the course of managing the subsidiary are by and for the benefit of the subsidiary, not instances of manipulation by the parent in disregard of the subsidiary's interest. See *Pullman's*, 115 U.S. at 596; *Lusk*, 129 F.3d at 779; *Edwards Co.* v. *Monogram Industries, Inc.*, 730 F.2d 977, 985-986 (5th Cir. 1984) (en banc); *Fisser* v. *International Bank*, 282 F.2d 231, 238 (2d Cir. 1960). Cf. *Peterson* v. *Chicago, Rock Island & Pacific Ry.*, 205 U.S. 364, 390-391, 394 (1907).

The government simply assumes that CERCLA swept away that aspect of pre-existing law relating to the liability of separate but related corporate entities. What it urges, therefore, is "not a construction of [the] statute, but, in effect, an enlargement of it by the court, so that what was omitted" — *i.e.*, an explicit provision altering the liability of parent corporations and other shareholders — "may be included within its scope." *West Virginia University Hospitals, Inc.* v. *Casey*, 499 U.S. 83, 101 (1991) (quoting *Iselin* v. *United States*, 270 U.S. 245, 250-251 (1926) (Brandeis, J.)). But such an effort "[t]o supply omissions transcends the judicial function." *Ibid.* See *Northwest Airlines, Inc.* v. *Transport Workers Union*, 451 U.S. 77, 97 (1981) (the "authority to construe a statute is fundamentally different from the authority to fashion a new rule"). That is especially true when the omission relates to a well-established body of state corporation law. See *United States* v. *Texas*, 507 U.S. at 534. As the Court remarked in *United Savings Ass'n* v. *Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 380 (1988):

> Such a major change in the existing rules would not likely have been made without specific provision in the text of the statute * * *; it is most improbable that it would have been made without even any mention in the legislative history.

CERCLA, however, plainly makes no "specific provision" respecting the liability of a parent corporation or other shareholder of a corporation that is the apparent "operator" of a "facility." The legislative history likewise does not hint at such a sea-change in corporate law.[19] There is, in short, no textual justification for disregarding the full backdrop of common law that directly addresses both the larger topic of disregarding the corporate entity and the lesser included presumption that an officer of a subsidiary who also holds a position with the parent is the agent of the subsidiary when he purports to act for that company, not an infiltrating agent of the parent.

2. *The "Remedial Purpose" of CERCLA Does Not Justify Distorting Its Terms to Create a Federal Common Law of Corporate Shareholder Liability*

a. The government falls back (Br. 26) on the shopworn claim that the "remedial" purpose of CERCLA — a purpose shared by every statute creating civil liability — justifies expanding the scope of the statute beyond its terms. But that approach, which here would transform a simple allocation of liability to facility operators into a new and undefined vehicle

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[19] Indeed, the only tangentially relevant statements reflect an expectation that "issues of liability not resolved by" the text of CERCLA should be governed by "traditional and evolving principles of common law." See, *e.g.*, 1 LEG. HIST. at 686 (statement of Sen. Randolph); *id.* at 778 (statement of Rep. Florio). That common law, this Court has made clear, must be borrowed from the appropriate state.

for disregarding the corporate form, "ignores the complexity of the problems Congress is called upon to address and the dynamics of legislative action." *Board of Governors of Federal Reserve System* v. *Dimension Financial Corp.*, 474 U.S. 361, 373-374 (1986). Allowing perceived remedial intent to enlarge the terms of a statute "takes no account of the processes of compromise and, in the end, prevents the effectuation of congressional intent." *Id.* at 374. See *Director, OWCP* v. *Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 135-136 (1995).

Although a court may believe that CERCLA's remedial goals are so broad that they justify holding liable a person who "controls" or "participates in the management" of the person who actually operates a facility, courts cannot rewrite CERCLA in order to serve a judicial perception of the statutory purpose. See *Darden*, 503 U.S. at 325-326. In effect, by urging that CERCLA be read to disregard separate corporate entities, the government is simply "second-guess[ing] the methods Congress used to achieve its purposes." *Exxon*, 475 U.S. at 375. But additions to the liability scheme cannot be justified by a judicial perception "[t]hat Congress has not chosen the most comprehensive or efficient method of attacking the problem of hazardous substance discharges." *Id.* at 371. "The short answer is that Congress did not write the statute that way." *United States* v. *Naftalin*, 441 U.S. 768, 773 (1979).

In any event, the federal courts hold no commission to broaden statutory liability based on judicial speculation that Congress "would have done so had it thought about it." *West Virginia Hospitals*, 499 U.S. at 100. The government's contrary view "profoundly mistakes" the role of the courts vis-à-vis Congress (*ibid.*) and of federal legislation vis-à-vis the pre-existing and persisting "*corpus juris* of the states." *Atherton*, 117 S. Ct. at 670.

b. These concerns are especially acute given the attempt to use the word "operator" as a vehicle to create a specialized application of a federal common law of corporations. In such

circumstances, this Court permits unenacted federal substantive legal standards to displace the underlying state rules of decision only in response to a "significant conflict between some federal policy or interest and the use of state law." *O'Melveny*, 512 U.S. at 87 (quoting *Wallis*, 384 U.S. at 68).

Here, as in *O'Melveny*, "what is fatal to [the government's] position * * * is that it has identified no significant conflict with an identifiable federal policy or interest." 512 U.S. at 88. Here, again, "[t]here is not even at stake that most generic (and lightly invoked) of alleged federal interest, the interest in uniformity" (*ibid.*), for "[t]he rules of decision at issue here do not govern the primary conduct of the United States or any of its agents or contractors, but affect only" the government's "rights and liabilities * * * with respect to primary conduct on the part of private actors that has already occurred" (*ibid.*) — and occurred here, as in most CERCLA cases, many years before CERCLA was enacted.[20] "Uniformity of law might

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[20] Retention of state-law protections for the corporate entity does not give parent corporations *carte blanche* to abuse the "facilities" of their subsidiaries, and certainly does not "absolve[ ] parent corporations of liability[ ] even though they actively participated in the *operation* of a *facility* and *share responsibility* for the conditions at the *hazardous waste site*" (U.S. Br. 16) (emphasis added). A parent corporation could be directly liable as an operator at a facility owned by its subsidiary if, for example, the subsidiary held title to real estate that the parent used. Similarly, a parent could "operate" a facility that was owned and also operated by its subsidiary. For example, CPC would have operated the Muskegon "facility" if it had refined corn products (and disposed of hazardous wastes) there while Ott II made chemicals, or if CPC had dumped wastes from off-site manufacturing into the Muskegon lagoons. This Court has considered similar situations. *E.g.*, *NLRB* v. *Deena Artware, Inc.*, 361 U.S. 398, 405-410 (1960) (Frankfurter, J., concurring); see also *Esmark, Inc.* v. *NLRB*, 887 F.2d 739, 755-756 (7th Cir. 1989). And, of course, improper use of a subsidiary may render a parent liable under state law rules for piercing the corporate veil. That individual shareholders may rely on the same traditional protection (see U.S. Br. 16) -- a protection that may be lost if they personally participate in waste disposal (see, *e.g.*, *Donahey* v. *Bogle*, 129 F.3d 838, 840, 843 n.7 (6th Cir. 1997) (en banc), petition for cert. filed, No. 97-1163) — raises no additional problems, especially because culpable individual sole shareholders are particularly susceptible to the type of conduct that leads to disregard of the

facilitate" the government's (and private plaintiffs') "litigation of these suits, eliminating state-by-state research and reducing uncertainty[,] but if the avoidance of these ordinary consequences qualified as an identifiable federal interest" federal common law would become the rule, not the exception. *Ibid.* That is a result this Court has soundly rejected.

The only federal "policy" that the government can identify is the condition of its purse. Just as in *O'Melveny*, the government claims (Br. 26, 28 n.16) that to take CERCLA at face value, and thus to respect state-law limitations on intracorporate and corporate-shareholder liability, would "'disserve the federal program'" by allowing States to "insulate" persons from liability for clean-up costs, "thereby imposing costs 'on the nation's taxpayers, rather than on'" private parties. 512 U.S. at 89 (quoting government brief). But that concern does not justify the insertion of "any conceivable legal rules" that ease the government's burden: "there is no federal policy that the fund should always win." *Id.* at 88; see *Santa Fe*, 132 F.3d at 1301.

Moreover, the "alleged need for a more expansive view of * * * liability than state law currently provides" is not closely tied to CERCLA's goal of ensuring that hazardous wastes are cleaned up by the same "persons" that were responsible for their disposal. *Santa Fe*, 132 F.3d at 1300. State veil-piercing law also is directed at imposing liability on responsible parties when the corporate form is abused. See *id.* at 1301.[21] When to

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corporate form. The integrity of the statute does not require construing the word "operator" to nullify the corporate entity.

[21] The government also cannot explain why the word "owner" preserves state law concepts of the corporate entity, as the courts have uniformly found, *e.g.*, *John S. Boyd Co.* v. *Boston Gas Co.*, 992 F.2d 401, 408 (1st Cir. 1993); *Schiavone* v. *Pearce*, 79 F.3d 248, 254 (2d Cir. 1996); *United States* v. *USX Corp.*, 68 F.3d 811, 823 (3d Cir. 1995), but the word "operator" does not. Since ownership is far more direct and unimpeded than operation — and since "owner" liability may attach without any involvement in waste-producing or disposing activity — one would think that, if the government's logic were sound, all owners of owners would be "directly" liable, as would owners of owners of owners *ad infinitum*. But, although the government apparently can tolerate limiting owner liability to the corporate entity holding title to a facility (unless state law would allow piercing the corporate veil), it bristles at applying the same principles to operator liability. There is no basis for this distinction. See *Austin* v. *Michigan Chamber of Commerce*, 494 U.S. 652, 680 (1990) (the corporate form provides investors with "the immunization of their personal fortunes from liability for the actions of the association").

attribute the actions of one corporate "person" to another by virtue of the latter's relationship with its subsidiary "involves a host of considerations that must be weighed and appraised," a "weighing and appraising" that this Court has held belongs to government bodies other than the federal courts. *O'Melveny*, 512 U.S. at 89. See *id.* at 90 (Stevens, J., concurring). That is particularly true here, where the proposed "federal rule would disrupt" long-settled "commercial relationships predicated on state law." *United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715, 729 (1979); *Santa Fe*, 132 F.3d at 1300.

"Simply put," the federal courts "have no warrant to expand what little federal common law of necessity fills the interstices of our federated legal system — especially in an area where the Congress had legislated to some extent yet stopped short of supplanting a well-developed body of state law." *A.I. Trade Finance, Inc.* v. *Petra International Banking Corp.*, 62 F.3d 1454, 1459 (D.C. Cir. 1995). Given how comprehensively CERCLA addresses the subjects that it *does* address, "the lawmakers' silence upon [the] particular subject" of liability transcending a corporate entity "should be taken to reflect their intention to leave state law undisturbed in that regard — not as an invitation to the federal courts to conjure up a 'federal common law untethered to a genuinely identifiable (as opposed to a judicially constructed) federal policy.'" *Id.* at 1460 (quoting *O'Melveny*, 512 U.S. at 89).

c. Indeed, if any canon of construction applied here, it would be the rule of lenity, because the scope of the "operator" definition "has criminal applications." *United States* v. *Thompson/Center Arms Co.*, 504 U.S. 505, 517 (1992). Status as an "owner or operator" carries with it notification and reporting

requirements that, if violated, may subject the operator to criminal liability. 42 U.S.C. §§ 9603(c), 9603(d)(2). Because the reach of these obligations — and thus the criminal sanctions — may depend upon the scope of the "operator" definition, the statutory language must be construed narrowly even when civil liability is at stake. *Thompson/Center Arms*, 504 U.S. at 517-518. Accordingly, the word "operator" cannot be read to trench upon the common law protections for parent corporations and other corporate shareholders.

3. *The Government's Statutory Analogies Are Inapposite*

The government attempts to bolster its argument by citing (Br. 36-39) a handful of cases in which this Court, in addressing other statutes, has disregarded corporate entities without recourse to state law. The Court did not take the casual approach toward corporate entity law that the government suggests here, however, but noted the importance of the rule of limited liability and found extraordinary reasons to override it. *E.g.*, *Anderson* v. *Abbott*, 321 U.S. 349, 362-363 (1944).

Thus, the government observes that this Court disregarded the corporate form of a grossly undercapitalized bank holding company in *Anderson*. As the Court recently explained, however, "[i]n *Anderson*, federal jurisdiction was founded upon a federal law, 12 U.S.C. §§ 63, 64 (repealed), which specifically made shareholders of an undercapitalized federal bank liable up to the par value of their stock, regardless of the amount actually invested." *Peacock* v. *Thomas*, 116 S. Ct. 862, 866 n.4 (1996). It is a small leap indeed from an explicit statutory directive to disregard the corporate entity and hold shareholders liable — what the Court described as a "statutory policy of double liability" (321 U.S. at 362) — to a decision also to hold liable the shareholders of those shareholders.

Similarly, *First National City Bank* v. *Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 (1983), provides a poor excuse for ignoring the state law of the corporate entity. International law, not state law, governed the corporations at issue in that case: they were creations of the Communist

government of Cuba, used to avoid liability in such a way that veil-piercing might well have been available under the law of any American state. The labor cases also have no relevance here. *NLRB* v. *Deena Artware, Inc.* 361 U.S. 398 (1960), involved the application of common-law veil-piercing in a contempt proceeding in which the defendants had shifted assets among a series of shell corporations in efforts to preclude enforcement of an earlier judgment. And in *Radio & Television Broadcast Technicians Union* v. *Broadcast Service of Mobile, Inc.*, 380 U.S. 255 (1965), the Court's deference to the National Labor Relations Board's development of a "single employer" test simply represents the extraordinarily wide leeway this Court has given the NLRB to define terms in the statutes under its jurisdiction.[22]

The government's reliance on *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752 (1984), is simply puzzling. In that case, this Court did not deprive any corporation of the limited liability afforded by state law, but rather held that an agreement between a wholly owned subsidiary and its parent could not constitute a "conspiracy" under the antitrust laws "[b]ecause there is nothing inherently anticompetitive about a corporation's decision to create a subsidiary." *Id.* at 773. Equally far afield is *Bangor Punta Operations, Inc.* v. *Bangor & Aroostook R.R.*, 417 U.S. 703 (1974). *Bangor Punta* also had nothing to do with limiting liability to the corporate entity, although it did involve misuse of the corporate form: this Court barred the purchaser of a subsidiary corporation, ineligible to bring a shareholder derivative action and estopped from suing the seller in its own name, from bringing an action against the seller in the name of the acquired company.

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[22] See, *e.g.*, *Pattern Makers' League* v. *NLRB*, 473 U.S. 95, 100 (1985). Moreover, the NLRB's test incorporates the rigors of common-law veil-piercing far more than the indeterminate analysis favored by the government and used by the district court in the present case. See, *e.g.*, *Esmark*, 887 F.2d at 753-760.

In sum, this Court's cases do not support the government's effort to derive from congressional silence an intent to cast aside, wholesale, state law principles limiting the liability incurred by corporate entities.

C. Extending "Operator" Liability To Parent Corporations That Actively Oversee Their Subsidiaries Would Lead To Untenable Results

One reason why this Court requires Congress to make its intentions clear when it sets out to displace a significant part of the established legal landscape (*e.g.*, *United States* v. *Texas*, 507 U.S. at 534) is that such legislative clarity is more likely to yield a coherent legal standard to replace the common-law standard that has been cast aside. The uncertainty and fluidity of the government's proposed rule — not to mention its drastic and harmful consequences — demonstrates that the Court's caution is warranted.

1. *The Standardless Analysis Advanced By The Government Would Reach Most Parent Corporations Of Actual "Operators"*

The government does not settle upon a precise standard of parent corporation "operator" liability. That is not surprising: even the courts that endorse similar "participation and control" tests hesitate to define a standard that would constrain their *ad hoc* analyses. See, *e.g.*, *United States* v. *Kayser-Roth Corp.*, 910 F.2d 24, 27 (1st Cir. 1990) (declining to decide "the exact standard necessary for a parent to be an operator"), cert. denied, 498 U.S. 1084 (1991); *Schiavone* v. *Pearce*, 79 F.3d 248, 254 n.5 (2d Cir. 1996) (same).

The government does make clear that it would be sufficient to hold liable the parent corporation of any "operator" so long as the parent "employs its own agents" — by which the government means any person holding positions in both the parent and the subsidiary — "as executive officers (or as board members performing the typical functions of an executive officer) to manage the subsidiary." Br. 44. The rest of the

analysis apparently would be an entirely discretionary assessment of whether the parent corporation or other shareholder has "step[ped] beyond its role as a stockholder" (Br. 41). The low threshold for sufficiency, and the unguided nature of the analysis, would lead to especially unprobative inquiries in the CERCLA setting, where litigation would address such issues as the degree of "participation and control" by one company over another many decades before trial.[23]

The government does not commit itself to any set of relevant factors. The cases on which it relies, and the opinion of the district court in this case (which the government seems to endorse, Br. 44 n.32, 45-48), make clear that the *ad hoc* analysis supposedly inspired by the term "operator" is no more than a junior-varsity veil-piercing inquiry, using similar factors directed toward a similar goal — determining when a parent corporation has overstepped the boundaries consistent with limited liability — but substantially lowering the threshold for imposing liability. Whether the parent and subsidiary have directors and officers in common, whether the parent exercises control over the subsidiary's business decisions, and whether the parent is involved in the subsidiary's financial affairs all regularly appear in veil-piercing analyses. See S. PRESSER, PIERCING THE CORPORATE VEIL § 1.03[4] (1997); P. BLUMBERG, LAW OF CORPORATE GROUPS: PROCEDURAL PROBLEMS 16-17 (1983). See U.S. Br. 45-48 & n.32.[24] The government envisions (and lower courts have put into practice) a CERCLA-specific veil-piercing analysis that is not limited by the

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[23] Indeed, under this amorphous and unworkable standard, even minority shareholders might be held liable on the theory that they controlled an "operator" in some way. See *Pinal Creek Group* v. *Newmont Mining Corp.*, 926 F. Supp. 1400, 1414-1415 (D. Ariz. 1996), rev'd in part on other grounds, 118 F.3d 1298 (9th Cir. 1997), petition for cert. filed, No. 97-795.

[24] The resemblance to veil-piercing is no coincidence. The government's lead authority, *Kayser-Roth*, affirmed the analysis and decision of a district court that had used the same factors both to pierce the corporate veil and to impose "direct" operator liability by virtue of a watered-down veil-piercing analysis. See 724 F. Supp. 15, 22, 24 (D. R.I. 1989).

principles developed in state common law — a veil-piercing analysis with no rules (and thus no uniformity), amounting to a purely factual sniff test not coherently reviewable on appeal. Any attempt to refine the government's "participation and control" analysis can only heighten the familial resemblance — and the contrast — between that test and the legitimate, traditional veil-piercing inquiry.

Indeed, the principal factors on which the government would rely to make a parent the "operator" of its subsidiary's facility typify the parent-subsidiary relationship. By definition, a parent corporation controls its subsidiary. BLACK'S LAW DICTIONARY 1428 (6th ed. 1990). "[T]he parent's exercise of control * * * occurs in every parent-subsidiary relationship." BLUMBERG, PROCEDURAL PROBLEMS, *supra*, at 18. In addition, this Court has recognized that, for a parent corporation to "participat[e] in the affairs" of its subsidiary is "normal and usual," so that the subsidiary's corporate entity will be disregarded only if the subsidiary is a "mere agency or instrumentality of the owning company or companies." *Chicago, Milwaukee & St. Paul Ry.* v. *Minneapolis Civic & Commerce Ass'n*, 247 U.S. 490, 501 (1918) (finding instrumentality where subsidiary's board had no power to conduct its financial affairs, to choose a chief executive officer, or to choose the persons with whom or the terms on which the subsidiary would do business); see also *Esmark, Inc.* v. *NLRB*, 887 F.2d 739, 759 (7th Cir. 1989) ("Parents * * * are almost always 'active participants' in the affairs of an owned corporation.").[25]

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[25] The government pointedly avoids placing significance on the usual prerequisites for disregarding a subsidiary's identity, such as indiscriminate intermingling of business transactions, employees, and property; circumvention (not, as the government would have it, use) of the subsidiary's "decisionmaking hierarchies" (U.S. Br. 45); inadequate capitalization or siphoning of funds; failure to hold out the subsidiary as a separate enterprise; and decisionmaking that benefits the parent while harming the subsidiary. H. HENN & J. ALEXANDER, LAWS OF CORPORATIONS 355-356 (3d ed. 1983); see *Consolidated Rock Products Co.* v. *Du Bois*, 312 U.S. 510, 523-524 (1941).

But that is not all. Most parent corporations would qualify for "operator" treatment based on the sole criterion that the government articulates (Br. 44): giving officers of the parent positions within the subsidiary as well. "Common management and ownership are ordinary aspects of a parent-subsidiary relationship." *Lusk*, 129 F.3d at 778. And it is "normal" for a parent corporation and its subsidiary to have "identical directors and officers." H. HENN & J. ALEXANDER, LAWS OF CORPORATIONS 355 (3d ed. 1983)). The government's suggestion (Br. 44) that this is not the "typical practice" is either disingenuous or misinformed.

This case illustrates the limitless pliability of the analysis that the government asks this Court to adopt. The district court based CPC's liability for "operating" the Ott II facility largely on CPC's *leaving Ott I officers in place* while assigning two of them separate duties for CPC. If the "participation and control" test effectively pierces the corporate veil based on the acts of employees such as Ott and Eiszner, then any use of dual directors or officers would subject a parent corporation to CERCLA liability for the operations of its subsidiary.

2. *A Standardless Expansion Of Parent Corporation "Operator" Liability Would Have Undesirable Consequences*

As the Sixth Circuit recognized (Pet. App. 14a-15a), the overbroad and uncertain standard of liability that the government advocates would disserve the environmental goals of CERCLA while thwarting the strong public policies underlying the traditionally separate treatment of parent and subsidiary corporations. Because a parent corporation is more likely to be held liable under the "participation and control" standard the more attention it pays to the affairs of its subsidiaries, that standard creates perverse incentives for parents to exercise less supervision over their subsidiaries, *especially* in environmental matters.

Given proper respect for the corporate form, parent corporations have incentives to ensure that their subsidiaries strictly

comply with environmental standards and to aid the subsidiaries in attaining that compliance; non-compliance could jeopardize the parent's sizable investment in the subsidiary. Under the government's test, however, responsible environmental oversight by the parent would jeopardize the *parent's* assets. That test would create incentives of an entirely different kind.

The weakened and uncertain status of the corporate entity under the standard proffered by the government also would discourage corporations from investing in waste sites and putting them to productive use. No rational corporation would invest in a known waste site if by doing so it either had to place its own assets at risk or in effect had to abandon the principal business of the waste-site subsidiary (along with the parent's investment) to an entirely unsupervised management.

Not only would the government's standard have undesirable effects on future conduct, but it would unjustifiably penalize "private parties [who] have entered legal relationships with the expectation that their rights and obligations would be governed by state-law standards," *Kamen*, 500 U.S. at 98, and in particular have "relied on state corporation law when making corporate acquisitions and in forming * * * corporations." *Anspec Co.* v. *Johnson Controls, Inc.*, 922 F.2d 1240, 1250 (6th Cir. 1991) (Kennedy, J., concurring). The creation and imposition of a new federal rule of parent corporation liability for CERCLA would be especially unfair, because it would cast aside legal rules that companies relied on for decades and would impose huge monetary penalties based on conduct by subsidiaries that violated no law when it took place. Such "disrupt[ion of] commercial relationships predicated on state law" is unwarranted where there is no sign that Congress intended to work that result in CERCLA. *Kimbell Foods*, 440 U.S. at 729. As Chief Judge Cardozo observed, loosening the principles of corporate integrity to "ignore the separation between subsidiary and parent" for result-oriented purposes "thwart[s] * * * public policy" rather than "defending or

upholding it." *Berkey* v. *Third Avenue Ry.*, 244 N.Y. 84, 95, 155 N.E. 58, 61 (1926).

3. *Allowing The Word "Operates" To Support Creation Of A Federal Standard For Parent Corporation Liability Would Encourage The Development Of Federal Common Law Veil-Piercing Based On Other Statutory Terms*

If this Court holds that the word "operates" is enough to brush aside state corporation law, then, contrary to this Court's earlier holdings, "the entire corpus of state corporation law" quite possibly *will* be replaced "simply because a plaintiff's cause of action is based upon a federal statute." *Burks*, 441 U.S. at 478. If a corporation that oversees a legally separate "operator" of a "facility" thereby becomes an "operator" in its own right, the many federal statutes placing duties or liabilities on "operators" may be transformed in scope — as may the statutes affording privileges or benefits to "operators."

Moreover, if this Court were to uphold the presumption, contrary to common law, that dual officers and directors render a parent corporation liable for all activities of the subsidiary in which those individuals play any part, any noun or verb in the United States Code could serve as the basis for a "new, middle ground" of parent corporation liability. The path would be cleared for lower courts to make, for example, the parent-"employer" of a subsidiary-"employer" liable to an employee of the latter under a far wider set of circumstances than the law currently allows — for example, if the employee reports to an officer of the subsidiary who also holds a position with the parent corporation. The use of the mundane word "operator" in CERCLA provides no good reason to prompt such a global transformation in federal law.

D. CPC Cannot Be Held Liable As An "Operator" Under Any Reasonable Standard On This Record

1. The government (Br. 45) invites this Court to misapply the rule that "findings of fact *concurred in* by two lower courts"

will not be set aside except in response to exceptional showings of error. *Rogers* v. *Lodge*, 458 U.S. 613, 623 (1982) (emphasis added). But the court of appeals did not in any sense *concur* in the findings of the district court. Contrary to Michigan's contention (Br. 13), on appeal CPC pointed out the lack of record support for many of the district court's findings. See CPC Opening C.A. Br. 5-38. The Sixth Circuit did not have to address those contentions directly, because it determined that the legal question it was called upon to decide was not close under the applicable veil-piercing rule.

But the dearth of factual support for the district court's broad conclusions did not escape the Sixth Circuit's notice. To the contrary, the court of appeals remarked that, "*[i]f anything*, the *facts* recited by the district court" might "support liability" under a theory of "exertion of power or influence through active participation in the subsidiary's business," but could not support liability based on "actual operation of the subsidiary's business" — much less operation of the Muskegon "facility." Pet. App. 12a (emphasis added). The Sixth Circuit rejected as factually unsupported the district court's contrary findings on this and other issues. See, *e.g.*, *id.* at 12a, 18a, 21a-22a, 24a. In other ways, the court of appeals distanced itself from the district court's findings of fact; rather than adopting those findings, the Sixth Circuit "summarize[d] them * * * by way of background," even injecting the qualifier "[a]ccording to the district court." *Id.* at 3a. Indeed, the government earlier disputed some of the Sixth Circuit's factual statements, claiming that the district court had found otherwise. *E.g.*, U.S. Pet. 20 n.6. See also U.S. Br. 15 n.13; Mich. Pet. 18 & n.4.

At most, the court of appeals assumed *arguendo* the sustainability of the general findings that CPC owned 100% of Ott II, "participate[d] on Ott II's board of directors," and "cross-pollinat[ed] * * * officers," some of whom "were involved in decision-making and" at the highest level "daily operations" of Ott II's business as a whole; that CPC officials "active[ly] participat[ed] * * * in" — not "controlled" — Ott II "environmental matters"; and that CPC exercised high-level "financial control of Ott II through approval of budgets and capital expenditures." Pet. App. 16a-17a. But the court of appeals did not mention, much less "concur[] in" (*Rogers*, 458 U.S. at 623), the more extravagant and unsupported findings of the district court on which the government relies, much less the allegations that the district court itself did not find as fact. Those items cannot sustain a judgment of liability without undergoing a review for clear error that many could not survive.

2. If this Court adopted the test that the government seems, inconsistently, to endorse — whether a parent corporation "actively participated in the *operation* of a *facility*" (Br. 16; emphasis added) rather than in the overall management of the *subsidiary* — then, depending on how the new test was defined, the judgment either would have to be affirmed on the ground that the Sixth Circuit rejected an indistinguishable basis for liability (Pet. App. 12a, 17a-18a) or remanded for the application of the new standard to the evidence. As the government acknowledges (Br. 42), the district court "concluded that a parent corporation" may be liable for the operation "of its subsidiary's facility when it actively participates in, and exercises control over, the operations of the *subsidiary*" and simply equated that intermediated corporate involvement with "operation of the *facility*" (emphasis added).

But on an appropriate review of the record, CPC would not be liable even under any reasoned standard that departed from established state law principles. If such a standard could be derived from the cases that apply the sort of *ad hoc* analysis of parent-subsidiary relations that the government advocates here, that standard might be that a parent corporation would be liable as an "operator" of a facility operated by its subsidiary only if the parent exercises "pervasive control" over the "daily operations of the subsidiary," *Jacksonville Electric Auth.* v. *Bernuth Corp.*, 996 F.2d 1107, 1110 (11th Cir. 1993), or, more properly, over the "daily operations" of the waste "facility."[26] Such

[26] Like the government, we place to one side the outlier decision in *Nurad*,

"pervasive" and "total influence and control" is something akin to alter ego liability under state law. *Kayser-Roth*, 910 F.2d at 27; see also *Lansford-Coaldale Joint Water Auth.* v. *Tonolli Corp.*, 4 F.3d 1209, 1222 n.13 (3d Cir. 1993).

Although the district court broadly *concluded* that CPC "controlled" Ott II, the *facts* found by the district court make clear that CPC did not exercise "pervasive" control over operations at the Muskegon facility. The district court found that Ott II's overall policies were established by *its* "active board" of directors, which "continu[ed] the tradition established in the Ott I era of functioning in an engaged, participatory manner." Pet. App. 67a. And when the district court addressed day-to-day operations at the Muskegon plant, it recognized that Ott II managers, *not* CPC, controlled those activities: "Ott II corporate officers set the day-to-day operating policies for the company without any need to obtain formal approval from CPC," policies that ran the gamut from sales and marketing to "manufacturing[ ] and environmental matters." *Id.* at 69a.

As explained above, the district court premised CPC's operator liability primarily on CPC's *leaving Ott I officers* (Eiszner and Ott) *in place* while assigning them separate duties for CPC, and on the later appointment by Ott II's board of Warner, a CPC executive with responsibility for coordinating relations with and among subsidiaries, as CEO. But even the better-reasoned decisions that apply an improvised federal rule of parent corporation liability in the CERCLA context have explicitly recognized that the "mere fact that * * * individuals who were officers and directors for [the parents] concurrently served as officers and directors for [the subsidiary]" does not even "*tend* to establish" the type of "pervasive control" by the parent necessary to make it liable for its subsidiary's acts, but

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Inc. v. *William E. Hooper & Sons Co.*, 966 F.2d 837 (4th Cir.), cert. denied, 506 U.S. 940 (1992), which suggested that "direct" liability might attach to all majority stockholders of "operators." Although the government does not defend that bizarre conclusion, the only factor the government adds — the presence of dual officers or directors — narrows the field only slightly.

amounts only to appropriate parental oversight. *United States* v. *TIC Investment Corp.*, 68 F.3d 1082, 1092 (8th Cir. 1995) (emphasis added) (applying "pervasive control" analysis to "arranger" liability under 42 U.S.C. § 9607(a)(3)), cert. denied, 117 S. Ct. 50 (1996). Dual officers could be instruments of "pervasive control" only if the parent corporation employees who served on the subsidiary's board or in its management "made any decision that was dictated by [the parents] or otherwise exhibited divided loyalty when attending to [the subsidiary's] business." *Aluminum Co. of America v. Beazer East, Inc.*, 124 F.3d 551, 564 (3d Cir. 1997).

There was no evidence that any decisions of dual officers or directors improperly favored CPC at Ott II's expense. Warner's business decisions may have been unwise but their shortcomings had nothing to do with CPC's interests; that Ott II had to compete with CPC for Eiszner's attention reflects a characteristic problem whenever a valued employee has roles in several organizations. See U.S. Br. 46. The government also asserts (Br. 45), however, that the district court found that CPC "had placed its own high level officers in key management positions of its subsidiary specifically to ensure that CPC would actively participate in and maintain close control over the day-to-day running of the subsidiary's business at the Muskegon site." But the government's blanket citations (see Pet. App. 67a-77a, 110a-112a) do not reflect any finding by the district court that CPC allowed Ott and Eiszner to continue running what had been Ott's company "specifically to ensure that CPC would * * * maintain close control over the day-to-day running" of Ott II's "business," much less of the waste-disposal "facility." Nor do those findings reflect anything resembling "close control" by CPC "over the day-to-day running of [Ott II]'s business at the Muskegon site," much less control of the "facility" there.

The government also relies heavily (Br. 46) on a collection of several memoranda issued by G.R.D. Williams in the course of Ott II's seven-year existence to show that CPC "actively

participated in Ott II's environmental matters." The Sixth Circuit (see pp. 44-45, *supra*) did not agree with the government that the evidence respecting Williams demonstrated "control[]" by CPC (Br. 46) (*ibid.*), as the underlying facts showed only that Ott II kept Williams abreast of some environmental issues. In any event, much of what the district court *did* find with respect to Williams (Pet. App. 74a-76a) could not withstand clear-error review. While Williams generated memoranda every several months dispensing advice and suggesting that he be involved in Ott II environmental compliance activities, there was no evidence that Ott II acceded to these demands or altered a single decision in response to Williams' preferences. The evidence, to the contrary, was that Ott II and CPC alike considered Williams to have no authority to "require anybody in any location to do anything." C.A. App. 3269; see also *id.* at 2995-2996. The evidence reflected only that Ott II gave Williams "copies after the fact of decisions which [Ott II] had reached." *Id.* at 2895-2896, 2914-2915.

For example, uncontradicted evidence showed that Williams did not help plan the single presentation to MWRC that he attended or otherwise influence what was said at the meeting. C.A. App. 3053. The government's assertion (U.S. Br. 46; see Pet. App. 75a) that Williams prevented Ott II from presenting a biological treatment option at that meeting is unsupported, resting entirely on Williams' expression of his views in a memorandum dated two months *after* the meeting, *after* MWRC had been informed by Ott II's project consultant that the Ott II board had asked for "complete plans including waste treatment" (Exs. 327, 328), and *after* Ott II's consultants had given MWRC an analysis of wastewater treatment options that *included* biological treatment. See C.A. App. 1987, 1996, 2160, 2180; Ex. 341, at 23-24. Ott II had decided to defer installing a biological waste treatment facility *before* Williams offered his advice, and MWRC did not object to that course of action. C.A. App. 1992-1993, 1996, 2145-2147; Ex. 319. But Williams' suggestion that, in order to maximize tax benefits, Ott II defer environmental expenditures it had settled upon,

drew a sharp and dismissive response from Ott II's management: "we have no intention of delaying [the groundwater project] until early 1968 [because] it's instrumental to the success of this company [*i.e.*, Ott II] to get this thing handled as quickly as possible and we will stay on our own timetable." C.A. App. 2892, 2031-2033.[27]

The government also overstates the record (Br. 47) with respect to "CPC's involvement in Ott II's financial affairs." Ott II maintained its own general and payroll bank accounts; its accounting and financial records were separate from CPC's, and inter-corporate transactions were duly charged and recorded. C.A. App. 741, 742, 3456-3458. The district court's finding (Pet. App. 77a; see U.S. Br. 47) that "Ott II's funds were commingled with CPC's in a joint account" is a bizarre conclusion based on a single fact: CPC contributed funds to Ott II by transferring money to Ott II's separate operating account in Muskegon. See Tr. 843-844. That is not "commingling" under any normal standard, and the district court did not rely on that finding in concluding that CPC was liable. See Pet. App. 110a-111a. The government (Br. 47) and the district court (Pet. App. 77a) also found significant in itself CPC's provision of funds to Ott II; that reverses the classic analysis, which counts against the separate personality of the parent any acts of looting the subsidiary, rather than making further investments in it. See generally PRESSER, *supra*, at 1–51 n.8; P. BLUMBERG, LAW OF CORPORATE GROUPS: SUBSTANTIVE LAW 217 (1987). Finally, the government suggests (Br. 47) that CPC "operated" Ott II's waste-disposal "facility" by "limit[ing] the amount of capital expenditures permitted * * * without prior approval from CPC[]." The government does not explain what that typical feature of the parent-subsidiary relationship might have to do

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[27] The involvement of a CPC attorney in negotiating "the use of a county wastewater treatment system" bears no relation to the on-site "facility" at issue here. Even if occasional provision of legal resources could render a parent corporation an "operator" of a "facility" where its subsidiary disposed of hazardous waste, providing counsel with respect to an entirely different public "facility" cannot prove that the parent operated the on-site "facility."

with "operating" a "facility." The government's reliance on this point merely underscores the more significant fact that Ott II pursued its day-to-day (as opposed to extraordinary) activities and expenditures *without* seeking CPC's approval.

The "many other findings" to which the government refers (Br. 47) — CPC's ownership of 100% of Ott II's stock, its assistance on a handful of occasions in labor negotiations, and its intermittent provision of a few other corporate services (Pet. App. 110a-111a) — also are typical of the parent-subsidiary relationship. Such activities plainly do not demonstrate "pervasive control" by CPC over day-to-day operations of Ott II, much less control over the use of the "facility" at issue.

The Sixth Circuit correctly concluded that these routine activities did not show that CPC "directly operate[d] the facility itself." Pet. App. 17a-18a. Because CPC was not a "corporation[ ] that cause[d] environmental degradation" at the Muskegon site, and because its "active interest in the affairs of its subsidiary" was an entirely "proper use of the corporate form" that could not "authorize assignment" to it of Ott II's liability (*id.* at 17a), the Sixth Circuit correctly concluded that CPC was not liable as an "operator" here.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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FEBRUARY 1998